IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

TEXTS

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Comes now the United Farm Workers of America, AFL-CIO, by its attorneys Dianna Lyons, Carlos M. Alcala, Federico G. Chavez, Ellen J. Eggers, Daniel A. Garcia, Ira L. Gottlieb and Wendy Sones, and petitions this honorable Court to grant it leave to file an amicus curiae brief in support of respondent's position. This motion is based upon this notice, and the declaration of Carlos M. Alcala.

The amicus brief proposed to be filed accompanies this motion, pursuant to Supreme Court Rule 36.3.

DATED: 7-20-83

Respectfully submitted,

Carlos M. Alcala

CARLOS M. ALCALA

DECLARATION OF CARLOS M. ALCALA IN SUPPORT OF MOTION TO FILE AMICUS CURIAE BRIEF

1. I am an attorney admitted to practice before the Supreme Court of the State of California, and am a member of the Bar of the Supreme Court of the United States.

2. I represent the United Farm Workers of America, AFL-CIO ("UFW") in this matter, as do Dianna Lyons, Federico G. Chavez, Ellen J. Eggers, Daniel A. Garcia, Ira L. Gottlieb and Wendy Sones.

3. The UFW is a labor organization representing agricultural employees in the United States, including California, Florida and Arizona. Its headquarters is located in Keene, California. It represents approximately 100,000 farmworkers at various times of the year. A substantial proportion of such laborers, who work in the southwestern farm regions of California and Arizona, are undocumented workers from Mexico, Latin America and the Philippines.

4. The National Labor Relations Act ("NLRA") expressly excludes agricultural employees from its coverage. However, the legislatures of the states of California and Arizona have enacted agricultural labor relations laws adopting administrative procedures closely modelled upon the NLRA structure. This Court's decision in the case at bar will therefore strongly influence the decisions of tribunals in those two states, which are certain to be confronted with similar issues regarding undocumented workers in the foreseeable future.[1] California Labor Code §1148 declares

[1] In fact, there is now a case pending before the California Agricultural Labor Relations Board, *Rigi Agricultural Services*, 81-CE-167-SAL, in which the Board will address the issue of state labor law protection for undocumented workers.

that "applicable precedents" under the NLRA are to be followed by the state's agricultural labor board and courts.

5. In its amicus curiae brief, the UFW will argue for affirmance of the decision of the court below. The UFW wishes to emphasize for the Court the profound impact this decision will have upon labor relations in the United States, given the substantial numbers of undocumented workers now present and continuing to arrive in the country. Growers in the southwestern United States rely heavily on such workers in order to successfully harvest their crops. The unalterable reality of the magnitude of the illegal alien population in the United States, and the public policy repudiating conduct such as that engaged in by petitioners in this case, requires that NLRA protection be extended to such workers. The UFW respectfully seeks to call the Court's attention to the plight of the huge yet legally invisible population toiling in this country without the basic protections most American workers take for granted.

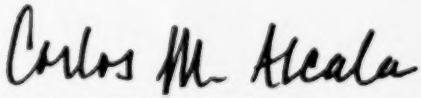
Extension of NLRA protection to undocumented workers benefits the public at large, and all workers in the United States. Today's undocumented workers are tomorrow's legal residents. This perspective should be considered by the Court in deciding this case.

6. Counsel for the UFW, Ira L. Gottlieb, has communicated by phone and letter with counsel for the petitioners, John A. McDonald of Keck, Mahin & Cate, and with the office of the Solicitor General, representing the Respondent. The Office of the Solicitor General replied by letter consenting to the UFW's petition. Counsel for petitioners has advised the UFW by letter that it opposes this amicus petition.

7. Upon the foregoing, the UFW respectfully requests this Court to GRANT its motion to file the attached amicus curiae brief, and consider said brief in making its decision in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,



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QUESTIONS PRESENTED

1. May an American employer freely commit unfair labor practices against its employees working in the United States, if those employees are undocumented workers?

2. May the Court of Appeals make an appropriate order to effect a complete remedy for undocumented workers harmed by an employer's unfair labor practices, where such order is in harmony with the Immigration and Nationality Act?

SUMMARY OF ARGUMENT

Undocumented workers are present in the United States in large and ever-increasing numbers. Many are employed in occupations which few native-born or naturalized citizens would find attractive. In the cities, there are the reconstituted garment-manufacturing sweatshops; and in rural areas, there are the agricultural sweatshops of farms and nurseries. The workers are often paid sub-minimum wages, and are subject to substandard working conditions. They are afraid to complain, since they are faced with the constant threat of deportation of themselves, their families and their relatives.

Employer exploitation of the undocumented workers' status is at the root of the problem presented in this case. That exploitation not only adversely affects the threatened worker, it forces American citizens to accept lower standards. If a proven labor law violator may be excused its transgressions because its victims are illegal aliens, such an employer will continue to seek out such employees, and will thereby free itself of its legal obligations toward its workers. There is unquestionably a substantial pool of undocumented labor present in this country; employers will eagerly tap that pool if by so doing they are licensed to abandon their duties under the laws regulating workers' organizational rights, minimum wage standards and health and safety conditions in the workplace. If the public policy behind the adoption of such laws is to be preserved, then employers must comply with those laws without regard to the alienage status of their employees.

The immigration laws were adopted to protect American workers from incursions into American job markets by foreign workers. Nothing in the position of petitioners

tends to support that policy. Petitioners' view of the law, if legitimated by this Court, would only enhance management's power at the expense of both American and foreign workers.

In the industries and enterprises where there are dominant populations of undocumented workers, a reversal of the Court of Appeals decision in this case means nothing less than judicial approval of substandard working conditions, and a return to the chaotic state of labor relations extant prior to the enactment of the NLRA.

ARGUMENT

I

THE MASSIVE, UNCHECKED INFLUX OF UNDOCUMENTED WORKERS INTO THE UNITED STATES HAS MADE SUCH WORKERS AN INTEGRAL PART OF THE AMERICAN LABOR FORCE, ENTITLED TO THE BASIC WORKPLACE RIGHTS ENJOYED BY NATIVE-BORN AND NATURALIZED CITIZENS AND RESIDENT ALIENS

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

Plyler v. *Doe*, ____ U.S. ____, ____, 102 S.Ct. 2382, 2396 (1982)

A. The Fact Of The Existence Of The Employer-Employee Relationship When The Employer Is Located And Does Substantial Business In The United States, Is Sufficient To Subject That Relation And That Employer To NLRB Adjudicative And Remedial Jurisdiction

The case at bar presents a poignant example of the difficult contemporary problems faced by this Nation of immigrants in confronting the reality of a substantial population of undocumented workers. As noted in *Plyer v. Doe, supra,* such workers are "subject to the full range of obligations imposed" by a State's civil and criminal laws, by virtue of their presence within that State, 102 S.Ct. at 2394. The same can be said of the applicability of federally-imposed obligations to persons who enter upon American soil.

In enacting the National Labor Relations Act, Congress sought to do more than protect workers' individual rights. The NLRA was enacted to promote, through protection of employees' organizational rights, and sanctioning of the collective bargaining process,

> the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employe . 29 U.S.C. §151.

Congress declared that the purpose of the NLRA—to remove obstructions to the free flow of interstate commerce—would be accomplished by

> encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. *Id.*

Inherent in this policy pronouncement, and in the enforcement scheme that follows (29 U.S.C. §§151, *et seq.*), is the Congressional desire to regulate not just the conduct of individual employers and employees, but the *relation between* employer and employees. It is the manner in which that relation is fashioned that determines the degree of success achieved by the NLRB in reaching the goals expressed in §151. And it is that relation which the NLRB and Court of Appeals properly sought to regulate in the case at bar.

Regardless of the undocumented status of the discharged workers, they had entered into an employment relationship with the petitioners (who accepted them without objection until the union was victorious), an American corporation doing substantial business in and located within the United States. These undisputed facts suffice to confer adjudicative and remedial jurisdiction upon the NLRB.[1]

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[1] These facts also serve to distinguish this case from those decided by this Court involving disputes between American unions and foreign maritime shipowners employing foreign crews, cited in *Windward Shipping Ltd., v. American Radio Ass'n.*, 415 U.S. 104, 109, fn. 10, 94 S.Ct. 959, 962 (1974).

In those cases, the Court objected to the potential insinuation of NLRB jurisdiction into essentially non-American labor relations, and found the maritime operations before it not to be within the stream of commerce regulated by the Act. Neither objection is applicable here. In any case involving foreign employers and American employees, this Court held that the Board could assert jurisdiction, *International Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200, 90 S.Ct. 872, 874 (1970).

B. Denial Of NLRA Protection To Workers Because Of Their Undocumented Status Violates The Fifth Amendment

This Court has ruled that workers have no Constitutional right to compel their employers to bargain collectively, though they are guaranteed the right to voice their views to the employer collectively, *Babbitt v. United Farm Workers*, 442 U.S. 289, 312-13, 99 S.Ct. 2301, 2316 (1979). However, it is a longstanding principle, implicitly recognized in *Babbitt* (see 442 U.S. 289, 313 fn. 19, 99 S.Ct. 2316), that if and when the government chooses to confer benefits, it may not discriminate among the potential beneficiaries in an unconstitutional manner. See *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970), *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).[2]

With respect to government discrimination between aliens and citizens, this Court has formulated a special adaptation of the traditional two-tiered equal protection analysis. "Heightened" scrutiny is applied to classifications "primarily affecting economic interests," while "strict scrutiny is out of place" when the restriction against aliens is

> within a State's constitutional prerogative [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders (citation omitted).

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[2] While the equal protection clause does not apply to the federal government, a similar doctrine of equal justice under law has developed under the Fifth Amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-101, 96 S.Ct. 1895, 1904 (1976).

Cabell v. Chavez-Salido, _____ U.S. _____, 102 S.Ct. 735, 739 (1982).[3]

For the workers and the employer involved in this case, the allocation of burden and benefit, respectively, of an exemption from the NLRA for undocumented workers would be primarily felt in economic terms. The employees could not require their employer to recognize and bargain collectively with a union. In practice, they could not wield any collective bargaining strength, nor make any demands upon their employer for better working conditions. Any such demand could be met, as happened here, by discharge, or other penalties or threats.[4] The employer would have no reason to respect (let alone accomodate) employees' demands, knowing that the remedial power of the NLRB could not be brought to bear against it.

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[3] The *Cabell* majority, in footnote 1 of its opinion, reserved the question of Constitutional limits on state action directed at *illegal* aliens. For the purposes of cases such as the one at bar, the analysis ought to be the same since the purposes behind enactment of the remedial portions of the NLRA do not vary with the immigration status of workers employed by an American employer.

Similarly, this Court has stated that aliens are protected under Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq. Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340 (1973), based on the breadth of the definition of the potential disciminatee found in §703.

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[4] *Sure-Tan* argues that its actions in this case do not constitute a constructive discharge. This contention will be discussed *infra*, but the ultimate effect of petitioners' position is that where the facts of the discharge are clear, and the discharge is indisputably based upon motives unlawful under the NLRA, the discriminatees are still left without a remedy. (The company unsuccessfully contended, in an earlier case, *Sure-Tan v. NLRB*, 583 F.3d 355 (7th Cir. 1978), that undocumented workers could not vote in an NLRB election).

C. Protection Under The NLRA For Undocumented Workers Does Not Interfere With Federal Immigration Policy

What gives this case its unique character is the need for consideration and harmonization of federal labor and immigration policies. We have considered above the public policy of the NLRA that would be promoted by affording its protection to undocumented workers.[5] In addition, providing such workers with the basic statutory guarantees of the Wagner Act is perfectly compatible with federal immigration policy.

Petitioners correctly assert that the immigration laws were passed to protect the jobs of American workers from competition from foreign immigrant workers. However, petitioners seek by their contentions not to protect the rights of its employees (after all, the removal of petitioners' employees occurred because of their support for a union, not because of their undocumented status—the laborers remained working after Surak discovered their status; he took action only after the union had triumphed), but to

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[5] One commentator has criticized the earlier *Sure-Tan* decision (see footnote 4, *supra*), contending that interpreting "employee" under the NLRA to include undocumented workers does not advance labor law policy, "Labor Law—Illegal Aliens Are Employees Under 29 U.S. C. §152(3) (1976) and May Vote in Union Certification Elections," 10 Rutgers-Cam. L.J. 747 (1979). As noted in the text of this brief, this is inaccurate. The commentator observes, for instance, at p. 753, that alien workers will not complain of labor law violations for fear of deportation. However, a union would have standing to complain, and remedies such as those ordered by the Court of Appeals should deter employers from exploiting the illegal alien status of its employees.

transform the INA into a management tool to void *all* employee rights under the NLRA in those places where illegal aliens work. There is no INA provision, and no hint of Congressional intent, that would support such a conclusion. The NLRA and INA were both enacted with the idea of protection of American employees' rights; petitioners' attempts to justify their actions in terms of INA policy is therefore a gross distortion, and disingenuous in light of the record.

It has been argued that the remedy provided by the Court of Appeals violates immigration policy because it encourages undocumented workers to return illegally to the United States. In the abstract, such an argument may appear logical. But if a worker presented himself for reinstatement and backpay, he or she would necessarily call attention to him or herself, inviting another deportation if the entry were illegal.

Furthermore, the numbers of undocumented workers attracted to this country by NLRB remedial orders would be minuscule compared to the numbers employers would recruit and hire in the hope of stripping their workforces of NLRA protection (as well as other Congressionally-mandated protection for workers). NLRB orders, issued case-by-case, affect single individuals or small groups if this court strips undocumented workers of Wagner Act protection, literally millions of workers presently in this country will suffer the consequences, while their employers reap the rewards. Employers would be motivated not only to hire undocumented workers, but to conceal them from immigration authorities.[6]

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[6] This actually occurred in a California agricultural labor case, *Rigi Agricultural Services*, 81-CE-167-SAL.

This case does not present this Court with two alternatives, only one of which tends to interfere with immigration policy. Rather, the choice is between respondent's position, which at most may result in a marginal change in immigration patterns, and petitioners' position, which will encourage employers to seek out undocumented workers to establish a regulation-free environment at their workplaces. Petitioners practically ask this Court to mandate employer-created "enterprise zones" where the force of labor relations law, health and safety laws, and fair labor standards laws would be suspended because of the make-up of the workforce. With no compelling justification for doing so under the strict scrutiny standard (there being no conflict with federal immigration policy), such discrimination is unconstitutional, prohibited by the Due Process Clause of the Fifth Amendment.

II

AN EMPLOYER WITHIN THE JURISDICTION OF THE WAGNER ACT CANNOT USE THE IMMIGRATION LAWS TO DEPRIVE ITS WORKERS OF THAT ACT'S PROTECTION

A. The Employer's Action In This Case Constitutes A Constructive Discharge

The petitioners seek to portray their conduct as pristine, consisting of nothing more than that which any law-abiding company might do to stem the tide of illegal immigration into this country. A review of the factual findings of the NLRB's Administrative Law Judge ("ALJ"), at 234 NLRB 1188-1191, will dispel that notion.

In sum, the ALJ found that the company: a) threatened its employees with less work if they voted for the union, and promised more work if they did not support the union; b) unlawfully interrogated the employees about their union sympathies; c) threatened its employees with notification of the INS of their illegal status; d) threatened to close down the business if the employees supported the union; e) requested an INS investigation of its employees' immigration status shortly after the union was certified, with full knowledge of such employees' undocumented status and the consequences of such an investigation.

This is not a company moved to call upon the INS on the crest of a wave of public-spiritedness; nor was it threatened with penalties arising out of its employ of undocumented workers. Petitioners were confronted only with a duty to bargain with the certified representative of their employees; they chose instead to utilize the INS to carry out their anti-union policy. Sure-Tan was not concerned with its employees' immigration status until the advent of the union. The National Labor Relations Board had ample reason to find the employer's actions to constitute a constructive discharge.

Petitioners' argument with respect to the constructive discharge appears to amount to a denial of the fact that it discharged anyone; indeed, it seems to deny that a discharge occurred at all.

Blaming the INS for the discharge is a little like a gunman blaming his gun for a shooting death. Petitioners acted with full knowledge of the consequences of their acts. Their abusive[7]—and unlawful conduct throughout the union

[7] One of the company's partners, John Surak, was found to have referred to the workers on several occasions as "son of a bitches", 234 NLRB at 1190.

campaign demonstrates petitioners' anti-union animus. The timing of John Surak's letter to the INS, a day after he was notified of the union's certification, clinches his conduct as violative of the NLRA, see e.g., *Rain-Ware*, 263 NLRB No. 8, 111 LRRM 1004 (July 30, 1982).

A discharge need not be directly instigated by the employer to be so defined. Petitioners concede that an employer may cause a discharge by creating intolerable conditions forcing an employee to resign. That the INS has an independent legal duty to perform its functions does not diminish petitioners' responsibility for setting events in motion; more than one actor can be said to have "proximately caused" a given result and bear legal responsibility therefor.

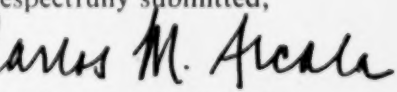
If the petitioners had directly discharged their employees their argument would remain the same. Either such workers are or are not entitled to protection under the NLRA. If they are, then inviting an intermediary to remove its employees will not shield the employer from the consequences of its unlawful acts. If undocumented workers are shorn of NLRA protection, the identity of the party who discharges the workers is immaterial.

CONCLUSION

This Court is confronted with the reality of the presence of millions of undocumented workers in this country. Many of them will eventually become legal residents. The intensity of the influx of such people will not be influenced by the Court's ruling in this case, but the basic standards and conditions under which all people live and work in America could well be significantly worsened if petitioners prevail.

This Court should therefore affirm the ruling of the court of appeals in all respects.

Respectfully submitted,



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CASE NAME: SURE-TAN v. NLRB

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PROOF OF SERVICE BY MAIL
(C.C.P. 1013a and 2015.5)

I, the undersigned, say I am a citizen of the United States and work in the county of Kern, California, in which county the within-mentioned mailing took place. I am over the age of eighteen years and not a party to the subject case. My mailing address is Post Office Box 30, Keene, California, 93531.

On July , 1983, I served the within: ENTRY OF APPEARANCE on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office box, at Keene, California addressed as follow:

Solicitor General
Department of Justice
Washington, DC 20530

Michael R. Flaherty
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Chicago, ILL. 60606

I declare under penalty of perjury that the foregoing is true and correct. Executed on July , 1983, at Keene, California.

JULIA ARISIAGA